53rd GRADUATE COURSE

JURISDICTION

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JURISDICTION

Outline of Instruction

I. INTRODUCTION.

Jurisdiction means the power of a court to try and determine a case, and to render a valid judgment. Courts-martial are courts of special and limited jurisdiction. For example, courts-martial jurisdiction applies worldwide, but is limited in application to a certain class of people—members of the armed forces. In general, three prerequisites must be met in order for courts-martial jurisdiction to vest. They are: (1) jurisdiction over the offense, (2) personal jurisdiction over the accused, and (3) a properly convened and composed court-martial.

Whether a court-martial is empowered to hear a case—whether it has jurisdiction—frequently turns on issues such as the status of the accused at the time of the offense, or the status of the accused at the time of trial. These issues of courts-martial jurisdiction relate to either subject matter jurisdiction (jurisdiction over the offense) or personal jurisdiction (personal jurisdiction over the accused). Subject matter jurisdiction focuses on the nature of the offense and the status of the accused at the time of the offense. If the offense is chargeable under the Uniform Code of Military Justice (UCMJ) and the accused is a servicemember at the time the offense is committed, subject matter jurisdiction is satisfied. Personal jurisdiction, however, focuses on the time of trial: can the government court-martial him? The answer is yes, so long as the accused has proper status, i.e., that the accused is a servicemember at the time of trial.

A. Sources of Jurisdiction.

1. The Constitution: Article I, section 8, clause 14

2. UCMJ, articles 2, 3 and 36

3. MCM, 2002 ed., RCM 201 - 204

4. Customary international law and treaties

B. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

C. Five Elements of Court-Martial Jurisdiction, R.C.M. 201(b):

1. Jurisdiction over the offense (subject-matter jurisdiction).

2. Jurisdiction over the person (personal jurisdiction).

3. Court properly composed (military judge and members must have proper qualifications).

a. *United States v. Morgan*, 57 M.J. 119 (2002). The defense counsel requested an enlisted members panel by faxing a notice to the military judge two weeks before trial. The accused never made forum selection at trial, but at no time during the four-day trial did the accused object to the enlisted members on the panel. Following a *DuBay* hearing, the service court held that there had been substantial compliance with Article 25, UCMJ. The CAAF affirmed, holding that the failure to get the accused's forum selection on the record was a procedural error, but was not a jurisdictional defect.

b. *United States v. Townes*, 52 M.J. 275 (2000). It was error for the military judge not to obtain on the record the accused's personal request for a trial by enlisted members as required by UCMJ, art. 25. However, based on the circumstances of the case, there was substantial compliance with Article 25, and the error did not materially prejudice the substantial rights of the accused—the error was non-jurisdictional.

c. *United States v. Daniels*, 50 M.J. 864 (Army Ct. Crim. App. 1999). A panel consisting of both officer and enlisted members convicted the accused. At no time during the court-martial did the accused personally elect to be tried by an officer/enlisted panel. During a *Dubay* hearing, the accused stated that she remembered telling her defense counsel she wanted to be tried by an enlisted panel. The Army Court cited to the "substantial compliance analysis" in *Turner* in holding that the error was not a jurisdictional error and the accused's affirmations during the *Dubay* hearing rendered the error harmless.

d. *United States v. Turner*, 47 M.J. 348 (1997). Absent evidence of coercion or ineffective assistance of counsel, accused's request to be tried by military judge alone can be inferred from the record of trial. Defense counsel, not the accused, represented for the record, both orally and in writing, that the accused elected to be tried by military judge alone. Even though the accused did not personally make the request, considering the facts in the case, there was substantial compliance to satisfy UCMJ, art. 16.

e. *United States v. Seward*, 49 M.J. 369 (1998). Failure to formally request trial by military judge alone prior to assembly was error. However, under the facts of the case, the error was not prejudicial. The accused did not request to be tried by military judge alone until after completion of the sentencing proceedings. The court found that the accused's desire to be tried by judge alone was apparent by the terms of the pre-trial agreement (an agreement to be tried by military judge alone) and the post-assembly written submission to be tried by judge alone.

f. *United States v. Cook*, 48 M.J. 434 (1998). The court-martial did not lack jurisdiction even though there were substitute members detailed to the court-martial who replaced excusals beyond the one-third excusal limitation. Prior to assembly, the SJA excused more than one-third of the total number of members originally detailed. The Convening Authority in turn detailed substitute members to the panel. The court held that the members detailed in excess of the one-third excusal limitation under R.C.M. 505(c)(1)(B)(ii) were not "interlopers" and did not deprive the court-martial of jurisdiction.

g. *United States v. Sargent*, 47 M.J. 367 (1997). The unexplained absence of a detailed member did not deprive the general court-martial of jurisdiction over the accused so long as the statutory quorum was satisfied.

4. Convened by proper authority.

A properly constituted court-martial may try any person subject to the UCMJ, even if the accused is not under the command of the convening authority. *United States v. Murphy*, 30 M.J. 1040 (A.C.M.R. 1990), set aside, on other grounds, 36 M.J. 8 (C.M.A. 1992); *accord United States v. Randle*, 35 M.J. 789 (A.C.M.R. 1992). *See also United States v. Cantrell*, 44 M.J. 711 (A.F. Ct. Crim. App. 1996).

5. Charges properly referred.

a. *United States v. Williams*, 55 M.J. 302 (2001). One GCMCA (BG Essig) referred the case to trial on 10 Oct 95 and the accused was arraigned on 19 Oct 95 but did not enter pleas. On 26 Oct 95, BG Essig transmitted the case to his immediate superior, a second GCMCA (MG Foley), noting that he had previously referred this case to trial by GCM convened by CMCO No. 1. BG Essig retired on 31 Oct 95. Following several pretrial sessions, MG Foley referred the case to trial under GCMCO No. 2. The defense moved to dismiss the charges, arguing that the court-martial lacked jurisdiction because MG Foley had not properly withdrawn the initially referred charges. The CAAF held that under the circumstances, MG Foley's intent to withdraw the charges referred under GCMCO No. 1 was implicit in his re-referral of the same charges under GCMCO No. 2.

b. *United States v. Pate*, 54 M.J. 501 (Army Ct. Crim. App. 2000). Accused charged with violating Art. 92(2), failure to obey a lawful order, plead guilty by exceptions and substitutions to Art. 92(3), negligent dereliction of duty pursuant to a pretrial agreement. The PTA was not signed by the GCMCA, but instead the word "accepted" was circled with a notation indicating a voco to the SJA. Accused argued that since the CA never signed the PTA, the new charge was never referred. The Army Court held that jurisdiction existed since a proper referral does not need to be in writing. Petition for grant of review denied by CAAF (No. 01-0059/AR, 2001 CAAF LEXIS 216 (CAAF Mar. 5, 2001)).

c. *United States v. Underwood*, 50 M.J. 271 (1999). Issues of an improper referral for trial are not jurisdictional in nature. It was not an improper purpose to withdraw and re-refer charges to another court-martial because of witness availability.

II. JURISDICTION OVER THE OFFENSE.

A. Historical Overview.

1. *O'Callahan v. Parker*, 395 U.S. 258 (1969). The "service-connection" test is established.

2. *Solorio v. United States*, 483 U.S. 435 (1987). The Supreme Court overrules *O'Callahan*, abandoning the "service-connection" test, and holds that jurisdiction of a court-martial depends solely on the accused's status as a member of the Armed Forces.

B. **BOTTOM LINE:** Subject matter jurisdiction is established by showing military status at the time of the offense.

C. **Administrative Double Jeopardy Policies.** Generally, a member of the Armed Forces will not be tried by court-martial or punished under Article 15, UCMJ, for the same act for which a civilian court has tried the soldier. This policy is based on comity between the federal government and state or foreign governments. See AR 27-10, para. 4-2; JAGMAN, para. 0124.

D. **Capital Cases.**

1. *Loving v. United States*, 116 S.Ct. 1737 (1996). Justice Stevens (concurring) raised the question of whether a "service connection" requirement applies to capital cases. *See also United States v. Simoy*, 46 M.J. 601 (A.F. Ct. Crim. App. 1996) (a capital murder case in which the court made a specific finding that the felony murder was "service-connected").

2. *United States v. Gray*, 51 M.J. 1 (1999). The CAAF gives credence to Justice Stevens' concurring opinion in *Loving*. The CAAF makes a specific finding that there are sufficient facts present in *Gray*, a capital case, to establish a service connection to warrant trial by court-martial, but does not answer the question of whether a "service connection" requirement applies to capital cases.

E. **Subject Matter Jurisdiction Over Reservists/National Guard.**

1. The offense must be committed while the reservist has military status. *United States v. Chodara*, 29 M.J. 943 (A.C.M.R. 1990). *But see United States v. Lopez*, 37 M.J. 702 (A.C.M.R. 1993) (questioning the validity of the *Chodara* decision). *See also United States v. Smith*, Case No. 9500065, unpub. (Army Ct. Crim. App. 1998) (holding there was no court-martial jurisdiction over an offense that the accused allegedly committed while he was enlisted in the Mississippi National Guard).

2. Offenses committed as part of the accused's "official duties" *may* be subject to court-martial jurisdiction even where the accused is not on active duty. *See United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (finding subject matter jurisdiction existed even if the reserve officer signed his false travel vouchers after he completed his travel following active duty or inactive duty training).

3. Jurisdiction "is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence." *United States v. Oliver*, 57 M.J. 170 (2002). The CAAF found that the medical records submitted on appeal established that the accused had been retained on active duty beyond the expiration of his orders, thus satisfying subject-matter jurisdiction over the offense.

4. Jurisdiction attaches as a result of the individual's status as a member of the armed forces and travel time may be included – "departure for duty" test is not used. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), *cert. denied*, 493 U.S. 1045 (1990) (holding that jurisdiction attaches at 0001 hours of the effective date of the orders); *See also United States v. Phillips*, 58 M.J. 217 (2003) (jurisdiction over reservist existed under Article 2(c) when reservist voluntarily submitted to military authority by traveling on, and receiving pay and benefits for, an authorized travel day).

III. JURISDICTION OVER THE PERSON.

A. General Provisions: UCMJ, art. 2, provides jurisdiction over categories of persons with military status:

1. Enlistees; Inductees; Academy Cadets/Midshipmen

2. Retirees.

a. Jurisdiction over retirees is constitutional. *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958); *Sands v. Colby*, 35 M.J. 620 (A.C.M.R. 1992).

b. *United States v. Huey*, 57 M.J. 504 (N-M. Ct. Crim. App. 2002). The accused had served 20 years on active duty and was placed on the Retired List on 1 January 1989. In 1996 he worked as a Naval civilian employee in Okinawa. He confessed to engaging in sexual intercourse several times a week over a nine-month period with his 16-year old adopted daughter. By the time the raping stopped, the accused was 58 years old and his daughter was pregnant with his child. At trial, the accused moved to dismiss for lack of personal jurisdiction based upon a violation of constitutional due process under the Fifth Amendment. The accused cited to *Toth v. Quarles*, 350 U.S. 11 (1955) and argued that he had "obtained civilian status" and was being deprived of due process rights available only in a civilian courtroom. The service court disagreed stating that there "is no doubt that a court-martial has the power to try a person receiving retired pay."[*]

c. HQDA approval is required before prosecuting retirees (AR 27-10, para. 5-2). Failure to follow "policy" and obtain HQDA approval to try a retiree, however, is not jurisdictional error. *United States v. Sloan*, 35 M.J. 4 (C.M.A. 1992).

d. The Article 2(d), UCMJ, involuntary recall process required for members of a reserve component, is not required to bring retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve on to active duty in order to have jurisdiction over them. *United States v. Morris*, 54 M.J. 898 (N-M. Ct. Crim. App. 2001) *petition for review denied*, 2001 CAAF LEXIS 597 (May 22, 2001).

3. Persons in custody

a. Jurisdiction terminates once an accused's discharge is ordered executed (or enlistment expires) and he or she is released from confinement. The remaining suspended punishments are automatically remitted. *United States v. Gurganious*, 36 M.J. 1041 (N.M.C.M.R. 1993).

[*] The service court set aside the findings and sentence, dismissed the charges, and abated the proceedings in this case on 29 Aug 2002 due to the accused's death on 2 July 2002 (ten days before the opinion was decided). *See United States v. Huey*, 2002 CCA LEXIS 186 (Aug. 29, 2002).

b. *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). An accused that still has military confinement to serve pursuant to a court-martial sentence, is still a military prisoner subject to military jurisdiction under the concept of "continuing jurisdiction," notwithstanding the execution of his punitive discharge and receipt of the DD Form 214. This is true even where the prisoner is serving time in a state civilian prison. The discharge merely terminated his status of active duty, but did not terminate his status as a military prisoner.

4. P.O.W.'s

5. Persons accompanying or serving with the armed forces in the field in time of war.

6. Reservists. "Reserve Component" includes USAR and Army National Guard of the United States (ARNGUS) soldiers in Title 10, U.S. Code, duty status. (See sections II.E. and IV. of this outline).

B. **General Rule:** In general, a person becomes subject to court-martial jurisdiction upon enlistment in or induction into the Armed Forces, acceptance of a commission, or entry onto active duty pursuant to order. Court-martial jurisdiction ends upon delivery of a valid discharge certificate.

C. Inception of Court-Martial Jurisdiction.

1. **Enlistment:** A Contract Which Changes "Status." UCMJ, art. 2(b).

(B) THE VOLUNTARY ENLISTMENT OF ANY PERSON WHO HAS THE CAPACITY TO UNDERSTAND THE SIGNIFICANCE OF ENLISTING IN THE ARMED FORCES SHALL BE VALID FOR PURPOSES OF JURISDICTION UNDER SUBSECTION (A) AND A CHANGE OF STATUS FROM CIVILIAN TO MEMBER OF THE ARMED FORCES SHALL BE EFFECTIVE UPON THE TAKING OF THE OATH OF ENLISTMENT.

2. **Involuntary enlistment:** *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974) (coercion); *United States v. Lightfoot*, 4 M.J. 262 (C.M.A. 1978); and *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987) (proposed enlistment as alternative to civil prosecution -no coercion).

3. **Constructive Enlistment**. The codification of *In Re Grimley*, 137 U.S. 147 (1890). UCMJ, art. 2(c) (as amended in 1979):

(C) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PERSON SERVING WITH AN ARMED FORCE WHO—

(1) SUBMITTED VOLUNTARILY TO MILITARY AUTHORITY;
(2) MET THE MENTAL COMPETENCE AND MINIMUM AGE QUALIFICATIONS OF SECTIONS 504 AND 505 OF THIS TITLE AT THE TIME OF VOLUNTARY SUBMISSION TO MILITARY AUTHORITY;
(3) RECEIVED MILITARY PAY OR ALLOWANCES; AND
(4) PERFORMED MILITARY DUTIES;

IS SUBJECT TO THIS CHAPTER UNTIL SUCH PERSON'S ACTIVE SERVICE HAS BEEN TERMINATED IN ACCORDANCE WITH LAW OR REGULATIONS PROMULGATED BY THE SECRETARY CONCERNED.

D. Termination of Jurisdiction Over the Person.

1. **General Rule:** Discharge Terminates Jurisdiction.

2. ETS/EAS by itself does not terminate jurisdiction.

a. RCM 202(a) discussion: "Completion of an enlistment or term of service does not by itself terminate court-martial jurisdiction . . . court-martial jurisdiction normally continues past the time of scheduled separation until a discharge certificate or its equivalent is delivered or until the Government fails to act within a reasonable time after the person objects to continued retention."

b. *United States v. Poole*, 30 M.J. 149 (C.M.A. 1990). Jurisdiction to court-martial a servicemember exists despite delay—even unreasonable delay—by the government in discharging that person at the end of an enlistment. Even if the member objects, it is immaterial—the significant fact is that the member has yet to receive a discharge. Caveat: Unreasonable delay may provide a defense to "some military offenses."

c. RCM 202(c)(1): "Court-martial jurisdiction attaches over a person when action with a view to trial of that person is taken. Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." *See United States v. Self*, 13 M.J. 132 (C.M.A. 1982); *United States v. Benford*, 27 M.J. 518 (N.M.C.M.R. 1988).

d. *United States v. Lee*, 43 M.J. 794 (N.M. Ct. Crim. App. 1995). Focusing investigation on accused as prime suspect is enough to establish a "view towards trial" and preserve military jurisdiction beyond ETS/EAS. The court cites to apprehension, imposition of restraint, and preferral of charges as other actions, which attach court-martial jurisdiction, i.e., indicate a "view towards trial."

e. **Appellate Leave.** *United States v. Ray*, 24 M.J. 657 (A.F.C.M.R. 1987) (jurisdiction upheld where accused, on appellate leave, was not provided discharge due to governmental delay in executing punitive discharge).

3. When is discharge effective?

a. **On delivery.** *United States v. Melanson*, 53 M.J. 1 (2000). Jurisdiction existed because pursuant to AR 635-200, a discharge takes effect at 2400 hours on the date of notice of discharge to the soldier. *See also United States v. Williams*, 53 M.J. 316 (2000). A valid legal hold had been placed on accused prior to expiration of the date that constituted the effective date of the discharge. *United States v. Scott*, 11 C.M.A. 646, 29 C.M.R. 462 (1960). A discharge takes effect at 2400 hours on the date of discharge; even if the discharge is delivered earlier in the day (unless it is clear that it was intended to be effective at the earlier time).

b. **Valid Discharge Certificate:** Discharge Authority's Intent. Early delivery of a discharge certificate for administrative convenience does not terminate jurisdiction when certificate is clear on its face that the commander did not intend the discharge to take effect until later. *United States v. Batchelder*, 41 M.J. 337 (1994). *See also United States v. Guest*, 46 M.J. 778 (Army Ct. Crim. App. 1997).

c. **Final accounting of pay.** *United States v. Howard*, 20 M.J. 353 (C.M.A. 1985) (jurisdiction terminates on delivery of discharge and final pay).

d. **Undergo a clearing process.** *United States v. King*, 27 M.J. 327 (C.M.A. 1989) (sailor refused to complete re-enlistment ceremony after he received a discharge certificate). Three elements per King to effectuate an early discharge:

(1) Delivery of a valid discharge certificate;

(2) A final accounting of pay; and

(3) Undergoing a "clearing" process as required under appropriate service regulations to separate the member from military service.

4. **Erroneous Delivery.** Erroneous delivery will not terminate jurisdiction. *United States v. Garvin*, 26 M.J. 194 (C.M.A. 1988) (premature delivery of a BCD certificate); *United States v. Brunton*, 24 M.J. 566 (N.M.C.M.R. 1987) (early delivery of discharge, in violation of Navy regulations, meant discharge was not effective on receipt).

5. **Post-arraignment Discharge.** A valid discharge of a soldier prior to trial operates as a formal waiver and abandonment of court-martial in personam jurisdiction, whether or not such jurisdiction had attached prior to discharge. *Smith v. Vanderbush*, 47 M.J. 56 (1997). In personam jurisdiction was lost when accused was discharged after arraignment but before lawful authority resolved the charges. The court considered the intent of the discharge authority and found that there was no evidence to show that the discharge authority (not CA) did not intend to discharge accused on his ETS. In determining a valid discharge the court considered: 1) delivery of discharge certificate; 2) final accounting of pay; and 3) intent of discharge authority.

6. **Post-conviction Discharge.** *Steele v. Van Riper*, 50 M.J. 89 (1999). After a court-martial conviction, but before the convening authority took action, the government honorably discharged the accused. When the convening authority finally took action, he approved the findings and sentence (which included a punitive discharge), declared that the honorable discharge was erroneous, and placed the accused in an involuntary appellate leave status. The accused challenged the invalidation of his honorable discharge. In a supplemental brief, the government concurred. As such, the CAAF denied the accused's writ-appeal, but advised that the honorable discharge does not affect the power of the convening authority or appellate tribunals to act on the findings and sentence. *See also United States v. Stockman*, 50 M.J. 50 (1998).

7. **Execution of Punitive Discharge.**

   a. *United States v. Keels*, 48 M.J. 431 (1998). Promulgation of a supplemental court-martial convening order that ordered executed a punitive discharge does not terminate court-martial jurisdiction. Even when there is a punitive discharge, jurisdiction does not terminate until delivery of the discharge certificate and final accounting of pay. There is not instantaneous termination of status upon completion of appellate review.

b. *United States v. Byrd*, 53 M.J. 35 (2000). In October 1996, the Navy-Marine Corps Court affirmed the accused's conviction and sentence, which included a punitive discharge. The accused did not petition CAAF for review until 22 January 1997. On 2 January 1997 the convening authority executed his sentence under Article 71. The service court held that since the accused did not petition CAAF for review within 60 days (a CAAF rule), the intervening discharge terminated jurisdiction. CAAF vacated the lower court's decision on the grounds that the Govt. failed to establish the petition for review as being untimely and, therefore, the sentence had been improperly executed. CAAF also held that jurisdiction existed notwithstanding execution of a punitive discharge under Article 71, and it was only a question of whether to consider the case under direct review or collateral review. *See also United States v. Engle*, 28 M.J. 299 (C.M.A. 1989).

8. **In Personam Jurisdiction in a Foreign Country.** *United States v. Murphy*, 50 M.J. 4 (1998). The accused was convicted of premeditated murder and sentenced to death for murders he committed while stationed in Germany. The accused challenged the jurisdiction of the court-martial. He argued that the military investigators misled the German Government to believe that the United States had primary jurisdiction of the case under the NATO SOFA. Based on this information, the German Government waived its jurisdiction. Had the German Government asserted jurisdiction, the accused could not have been sentenced to death because the Constitution of Germany prohibits the death penalty. The CAAF held that the accused lacked standing to object to which sovereign prosecuted the case. The important jurisdictional question to answer is, Was the accused in a military status at the time of the offense and at the time of trial? The court found that the accused was. The case was set aside and remanded on other grounds.

9. Exceptions to General Rule that Discharge Terminates Jurisdiction.

a. **Exception:** UCMJ, art. 3(a).

(A) [A] SUBJECT TO SECTION 843 OF THIS TITLE (ARTICLE 43), PERSON WHO IS IN A STATUS IN WHICH THE PERSON IS SUBJECT TO THIS CHAPTER AND WHO COMMITTED AN OFFENSE AGAINST THIS CHAPTER WHILE FORMERLY IN A STATUS IN WHICH THE PERSON WAS SUBJECT TO THIS CHAPTER IS NOT RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR THAT OFFENSE BY REASON OF A TERMINATION OF THAT PERSON'S FORMER STATUS.

Willenbring v. Neurauter, 48 M.J. 152 (1998). The CAAF holds that under the 1986 version of Article 3(a), UCMJ, court-martial jurisdiction exists to prosecute a member of the reserve component for misconduct committed while a member of the active component so long as there has not been a complete termination of service between the active and reserve component service. In dicta, however, the CAAF advises that the current version of Article 3(a), UCMJ, "clearly provides for jurisdiction over prior-service offenses without regard to a break in service." *But see Murphy v. Dalton*, 81 F.3d 343 (3d Cir. 1996) (holding that it is improper to involuntarily recall a member of the reserve component to active duty for an Article 32(b) investigation when the alleged misconduct occurred while the service member was a member of the active component).

b. **Exception:** UCMJ, art. 3(b), person obtaining a fraudulent discharge.

(B) EACH PERSON DISCHARGED FROM THE ARMED FORCES WHO IS LATER CHARGED WITH HAVING FRAUDULENTLY OBTAINED HIS DISCHARGE IS . . . SUBJECT TO TRIAL BY COURT-MARTIAL ON THAT CHARGE AND IS AFTER APPREHENSION SUBJECT TO THIS CHAPTER WHILE IN THE CUSTODY OF THE ARMED FORCES FOR THAT TRIAL. UPON CONVICTION OF THAT CHARGE HE IS SUBJECT TO TRIAL BY COURT-

MARTIAL FOR ALL OFFENSES UNDER THIS CHAPTER COMMITTED BEFORE THE FRAUDULENT DISCHARGE.

(1) *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981). May the government prosecute a soldier whose delivered discharge (Chapter 8 - pregnancy) was revoked for being obtained by fraud? C.M.A. allowed the court-martial proceedings to continue. The 5th Circuit affirmed the district court's denial of Wickham's request for habeas corpus relief. The court-martial may proceed. *Wickham v. Hall*, 706 F.2d 713 (5th Cir. 1983).

(2) *United States v. Reid*, 46 M.J. 236 (1997). The government must secure a conviction for fraudulent discharge prior to prosecuting the accused for other offenses. Article 3(b) clearly requires a two-step trial process. QUERY: What about offenses committed after the fraudulent discharge? Article 3(b) does not confer jurisdiction over offenses committed after the fraudulent discharge. The service court, in dicta, reasoned that after conviction for the fraudulent discharge, jurisdiction would exist over offenses committed after the discharge under UCMJ, art. 2.

(3) *United States v. Pou*, 43 M.J. 778 (A.F. Ct. Crim. App. 1995). Declaring a missing person "dead" is not the equivalent of a discharge of that person, therefore, art. 3(b) is inapplicable, and court-martial jurisdiction exists.

c. **Exception:** UCMJ, art. 3(c), deserter obtaining discharge for subsequent period of service.

(C) NO PERSON WHO HAS DESERTED FROM THE ARMED FORCES MAY BE RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER BY VIRTUE OF A SEPARATION FROM ANY LATER PERIOD OF SERVICE.

d. **Exception:** UCMJ, art. 2(a)(7), persons in custody of the armed forces serving a sentence imposed by court-martial. *United States v. Harry*, 25 M.J. 513 (A.F.C.M.R. 1987) (punishment cannot include another punitive discharge); *United States v. King*, 30 M.J. 334 (C.M.A. 1990) (prosecuted after BCD executed but still in confinement).

(A) THE FOLLOWING PERSONS ARE SUBJECT TO THIS CHAPTER:

(7) PERSONS IN CUSTODY OF THE ARMED FORCES SERVING A SENTENCE IMPOSED BY A COURT-MARTIAL.

e. **Exception:** UCMJ, art. 3(d), leaving a Title 10 status does not terminate court-martial jurisdiction.

(D) A MEMBER OF A RESERVE COMPONENT WHO IS SUBJECT TO THIS CHAPTER IS NOT, BY VIRTUE OF THE TERMINATION OF A PERIOD OF ACTIVE DUTY OR INACTIVE-DUTY TRAINING, RELIEVED FROM AMENABILITY TO THE JURISDICTION OF THIS CHAPTER FOR AN OFFENSE AGAINST THIS CHAPTER COMMITTED DURING SUCH PERIOD OF ACTIVE OR INACTIVE-DUTY TRAINING.

IV. JURISDICTION OVER THE RESERVE COMPONENT.

A. Historical Overview.

B. **BOTTOM LINE:** Reserve Component soldiers are subject to the UCMJ whenever they are in a Title 10 status: Inactive Duty Training (IDT), Active Duty Training (ADT), Annual Training (AT), or Active Duty (AD).

C. When does jurisdiction exist for IDT individual?

1. Compare UCMJ, art. 2, to service regulations defining IDT. *See* AR 27-10, para. 21-2(a) (jurisdiction continues during periods such as "lunch breaks" between unit training assemblies or drills on the same day and may continue overnight in situations such as overnight bivouac). For examples of IDT, *see* AR 140-1, Mission, Organization, and Training of Army Reserve.

2. Compare to ADT. *See United States v. Cline*, 29 M.J. 83 (C.M.A. 1989), cert. denied, 493 U.S. 1045 (1990) (holding that jurisdiction attaches at 0001 hours of the effective date of the orders). *See also United States v. Phillips*, 58 M.J. 217 (2003) (jurisdiction over reservist existed under Article 2(c) when reservist voluntarily submitted to military authority by traveling on, and receiving pay and benefits for, an authorized travel day).

3. *United States v. Wall*, 1992 CMR LEXIS 642 (A.F.C.M.R. 1992) (unpub. opinion) (jurisdiction existed over the accused during his lunchbreak).

4. *United States v. Morse*, No. ACM 33566, 2000 CCA LEXIS 233 (A.F. Ct. Crim. App. Oct. 4, 2000) *petition for grant of review denied*, 2001 CAAF LEXIS 1021 (Aug. 24, 2001) (accused's duty was not complete until travel forms were signed even if he did not sign the fraudulent travel forms until after he completed his travel).

D. UCMJ, art. 3(d). Prevents the termination of court-martial jurisdiction over a member of a Reserve Component who violates the UCMJ while in a Title 10 status by the member's release from active duty or inactive-duty training. Closes jurisdiction gaps recognized by *United States v. Caputo*, 18 M.J. 259 (C.M.A. 1984) and *Duncan v. Usher*, 23 M.J. 29 (C.M.A. 1986).

E. Involuntary Recall to Active Duty. UCMJ, art. 2(d), authorizes a member of a Reserve Component, who is the subject of proceedings under Articles 15 or 30, UCMJ to be ordered involuntarily to active duty for:

1. Article 32 investigation.

2. Trial by court-martial.

3. Nonjudicial punishment.

F. Restrictions on the involuntary recall process.

1. A member may only be ordered to active duty by an active component general court-martial convening authority (GCMCA). UCMJ, art. 2(d)(4); AR 27-10, para. 21-3.

2. Unless the order to involuntary active duty was approved by the appropriate Service Secretary, the member may not be:

a. sentenced to confinement;

b. forced to serve any punishment involving restriction on liberty except during a period of inactive duty training or active duty; or

c. placed in pretrial confinement. UCMJ, art. 2(d)(5).

3. General and Special Courts-Martial. Prior to arraignment the reservist must be on active duty. R.C.M. 204(b)(1).

4. Summary Courts-Martial. Can be initiated and tried within the reserve structure and without active duty involvement. R.C.M. 204(b)(2). But the summary court-martial officer must be placed on active duty. UCMJ, art. 25; R.C.M. 1301.

G. Impact on the National Guard.

1. 32 U.S.C. § 505 - Training in a state status - No federal military jurisdiction.

2. 10 U.S.C. § 672 - Training in a federal status - Guard member is subject to jurisdiction and the reserve jurisdiction legislation's major provisions. This includes involuntary recall.

3. Federal status continues until the guard member has completed his federal service (excluding AWOL time) and federal jurisdiction exists notwithstanding state action to terminating jurisdiction. *United States v. Wilson*, 53 M.J. 327 (2000).

V. PROCEDURAL CONSIDERATIONS.

A. Pleading Jurisdiction. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977).

B. Lack of Jurisdiction: Raised by Motion to Dismiss, R.C.M. 907. May be made at any stage of the proceeding.

C. Burden of Proof:

1. *United States v. Bailey*, 6 M.J. 965 (N.M.C.M.R. 1979); R.C.M. 905(c)(1)(preponderance); R.C.M. 905(c)(2)(B) (burden of persuasion on government).

2. *United States v. Marsh*, 15 M.J. 252 (C.M.A. 1983) (for "peculiarly military" offenses like AWOL, an accused's military status is an element of the offense which must be proved beyond a reasonable doubt to the fact finders). *See also United States v. Roe*, 15 M.J. 819 (N.M.C.M.R. 1983).

VI. OTHER CONSIDERATIONS.

A. **Military Extraterritorial Jurisdiction Act of 2000.**

1. The MEJA was approved by Congress and signed into law by the President on 22 November 2000. This legislation *does not expand military jurisdiction*; it extends federal criminal jurisdiction over certain civilians (DOD employees, contractors, and dependents thereof, and military dependents) accompanying the military overseas. *The implementing regulations are under final review before being sent to Congress.*

2. The Act applies to felony level offenses that would apply under federal law if the offense had been committed within the "special maritime and territorial jurisdiction of the United States."

3. The Act provides for an initial appearance proceeding, which may be carried out telephonically, conducted by a Federal magistrate judge. At this proceeding, the magistrate will determine if there is probable cause to believe a crime was committed and if the person committed it. If pretrial detention is an issue, the magistrate will also conduct a detention hearing as required by federal law. This detention hearing may also be conducted telephonically if the person so requests.

4. The Act directly involves the military in two ways.

   a. The Act, depending on implementing rules, may authorize DOD law enforcement personnel to arrest those civilians covered by the Act.

   b. The Act entitles those civilians covered by the Act, to representation by military counsel (i.e. judge advocates) at the initial hearing, if determined by the Federal magistrate.

B. 2003 National Defense Authorization Act.

1. Contains a provision that discusses jurisdiction of National Guard members not in Federal service. Does not change the lack of federal jurisdiction over National Guard members in a Title 32 status; only reorganizes the sections of Title 32 U.S.C. §§ 326-333.

2. Requires the Secretary of Defense to "prepare a model State code of military justice and a model state manual for courts-martial to recommend to the States for use with respect to the National Guard not in Federal service."

VII. APPELLATE JURISDICTION: THE ALL WRITS ACT, 28 U.S.C. § 1651(A).

A. **Introduction.** In 1948, Congress enacted the All Writs Act, which gave federal appellate courts the ability to grant relief in aid of their jurisdiction. The All Writs Act does not confer an independent jurisdictional basis; rather, it provides ancillary or supervisory jurisdiction to augment the actual jurisdiction of the court. In 1969, the Supreme Court held that the All Writs Act applied to our military appellate courts. *Noyd v. Bond*, 395 U.S. 683 (1969). Consistent with federal courts, our military appellate courts view writ relief as a drastic remedy that should only be invoked in those situations that are truly extraordinary.

B. Scope of Authority.

1. "All Writs Act." 28 U.S.C. § 1651(a).

"The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

2. "[A]ll courts established by act of Congress." Includes both Court of Appeals for the Armed Forces and service Courts of Criminal Appeals. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). *See also Noyd v. Bond*, 395 U.S. 683 (1969); *United States v. Curtin*, 44 M.J. 439 (1996); *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *McPhail v. United States*, 1 M.J. 457 (C.M.A. 1976); *United States v. Frischholz*, 16 U.S.C.M.A. 150, 36 C.M.R. 306 (1966).

C. Writ Classifications.

1. Mandamus.

a. **Definition.** Directs a party to take action; rights are not established or created; pre-existing duty enforced. *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979); *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996); *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991); *United States v. Eggers*, 32 M.J. 583 (A.C.M.R. 1990) ("It is designed to confine a lower court to the lawful exercise of its prescribed jurisdiction." *Id.* at 584).

b. **Burden.** Petitioners must show that they lack adequate alternative means to obtain the relief they seek and carry "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable.'" *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953).

2. Prohibition.

a. **Definition.** Directs a party to cease doing an act or prohibits execution of a planned act that violates a law or an individual's rights. *Cunningham v. Gilevich*, 36 M.J. 94 (C.M.A. 1992); *Moye v. Fawcett*, 10 M.J. 838 (N.M.C.M.R. 1981).

b. **Burden.** The same as a writ of Mandamus. Issuance of a writ of prohibition is a drastic remedy that should only be invoked in those situations that are truly extraordinary. *Pearson v. Bloss*, 28 M.J. 764 (A.F.C.M.R. 1989).

3. Error Coram Nobis.

a. **Definition.** "In our presence"; a review of a court's own prior judgment predicated on a material error of fact. *Chapel v. United States*, 21 M.J. 687 (A.C.M.R. 1985). Now also to correct constitutional or fundamental errors, including those sounding in due process. *Ross v. United States*, 43 M.J. 770 (N.M. Ct. Crim. App. 1995).

b. **Burden.** That (1) an error has been made that was unknown to the accused during appeal; (2) a more usual remedy is unavailable; (3) valid reasons exist for not previously attacking the conviction; and (4) the error was such a fundamental nature as to render the proceedings irregular and invalid. *Tillman v. United States*, 32 M.J. 962 (A.C.M.R. 1991). *See also Garret v. Lowe*, 39 M.J. 293 (C.M.A. 1994); *Ross v. United States*, 43 M.J. 770 (N.M. Ct. Crim. App. 1995); *Shelby v. United States*, 40 M.J. 909 (N.M.C.M.R. 1994).

4. Habeas Corpus.

a. **Definition**. "That you have the body"; directs the release of a person from some form of custody. *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993); *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990).

b. **Burden**.

(1) Pre-trial confinement—Did the convening authority abuse his discretion; apply same standard as Mandamus. *Keaton v. Marsh*, 43 M.J. 757 (Army Ct. Crim. App. 1996); *Frage v. Moriarty*, 27 M.J. 341 (C.M.A. 1988).

(2) Post-trial confinement—Have all administrative remedies been exhausted and is the confinement illegal? *United States v. Miller*, 44 M.J. 582 (A.F. Ct. Crim. App. 1996); *McCray v. Grande*, 38 M.J. 657 (A.C.M.R. 1993).

D. Theories of Jurisdiction.

1. **Actual Jurisdiction**: The authority of the appellate courts to review a court-martial on direct review.

a. Article 66, UCMJ—Court of Criminal Appeals jurisdiction. Every court-martial in which the approved sentence extends to death, dismissal, punitive discharge or confinement for one year or more.

b. Article 67, UCMJ—Court of Appeals for the Armed Forces jurisdiction. Every court-martial in which the sentence as affirmed by a Court of Criminal Appeals extends to death...cases certified by the Judge Advocate General...and cases reviewed by Courts of Criminal Appeals where accused shows good cause for grant of review.

c. Article 69, UCMJ—The Court of Criminal Appeals may review any court-martial where action was taken by the Judge Advocate General pursuant to his authority under Article 69, or has been sent to the Court by the Judge Advocate General for review.

2. **Potential Jurisdiction**. The authority to determine a matter that may reach the actual jurisdiction of the court.

a. *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996). Petition for writ of mandamus to open Article 32 hearing to public where USAF major charged with murder of child. Court found jurisdiction to consider petition for extraordinary relief in exercising supervisory authority over court-martial process, and over cases that may potentially reach court on appeal. Since Article 32 hearing is integral part of court-martial process, then court has jurisdiction to supervise each tier of military justice process.

b. *U.S.N.M.C.M.R. v. Carlucci, et al*, 26 M.J. 328 (C.M.A. 1988); *Waller v. Swift*, 30 M.J. 139 (C.M.A. 1990). ("The sentence adjudged by the court-martial included a punitive discharge and so was of a severity that would have authorized direct appellate review by this court. Indeed, even in its commuted form, the sentence is of such severity." *Id*. at 142*). See also Addis v. Thorsen*, 32 M.J. 777 (C.G.C.M.R. 1991).

3. **Ancillary jurisdiction**. Ensuring adherence to a court order. The authority to determine matters incidental to the court's exercise of its primary jurisdiction, such as ensuring adherence to a court order. *Boudreaux v. U.S.N.M.C.M.R.*, 28 M.J. 181 (C.M.A. 1989); *United States v. Montesinos*, 28 M.J. 38, n.3 (C.M.A. 1989) (Because the integrity of the judicial process is at stake, appellate courts can issue extraordinary writs on their own motion).

4. **Supervisory Jurisdiction**. A case that "touches" the military justice system. The broad authority to determine matters that fall within the supervisory function of administering the military justice system.

a. *Unger v. Zemniak*, 27 M.J. 349 (C.M.A. 1989). Military appellate courts have jurisdiction to grant extraordinary relief under the All Writs Act over courts-martial that do not qualify for review in the ordinary course of appeal.

b. *Jones v. Commander*, 18 M.J. 198 (C.M.A. 1984) (Everett, C.J., dissenting). The court refused to exercise writ jurisdiction over a nonjudicial punishment proceeding.

E. Actual v. Supervisory Jurisdiction: the All Writs Act and *Goldsmith*

1. **Recent Case Law (Pre-Goldsmith).** *ABC Inc. v. Powell*, 47 M.J. 363 (1997). Absent "good cause," petitions for extraordinary relief should be submitted initially to the Court of Criminal Appeals. The CAAF exercised supervisory jurisdiction under the All Writs Act to grant relief during an Article 32(b) Investigation.

2. *Loving v. Hart*, 47 M.J. 438 (1998). The CAAF has jurisdiction to issue a writ under the All Writs Act even after the case has been affirmed by the Supreme Court. The accused sought extraordinary relief because his death sentence was based in part on a conviction of felony murder that was unsupported by a unanimous finding of intent to kill or reckless indifference to human life. This was an issue raised by Justice Scalia during oral argument before the Supreme Court. The CAAF heard the petition but denied relief.

3. *United States v. Dowty*, 48 M.J. 102 (1998). The CAAF has authority under the All Writs Act to exercise jurisdiction over issues arising from proceedings where the Court would not have had direct review.

4. *Dew v. United States*, 48 M.J. 639 (Army Ct. Crim. App. 1998). Under the All Writs Act, the Army Court has supervisory jurisdiction to consider, on the merits, a writ challenging the action taken by The Judge Advocate General pursuant to Article 69(a), UCMJ. The accused was convicted of making and uttering worthless checks by dishonorably failing to maintain funds. The Office of the Army Judge Advocate General reviewed the case and denied relief. The accused petitioned the Army Court, challenging the decision made by the Office of the Judge Advocate General. The Army Court exercised its supervisory authority under the All Writs Act, heard the petition, but denied relief.

5. *Clinton v. Goldsmith*, 526 U.S. 529 (1999). The CAAF exercised supervisory jurisdiction under the All Writs Act to stop the government from dropping the accused from the roles of the Air Force. The Supreme Court unanimously held that the CAAF had exceeded its supervisory jurisdiction under the All Writs Act, to issue the injunction in question because, (1) the injunction was not "in aid of" the CAAF's strictly circumscribed jurisdiction to review court-martial findings and sentences; and (2) even if the CAAF might have had some arguable basis for jurisdiction, the injunction was neither "necessary" nor "appropriate," in light of the alternative federal administrative and judicial remedies available, under other federal statutes, to a service member demanding to be kept on the rolls.

6. **Recent Case Law (Post-Goldsmith).** *United States v. King*, No. 00-8007/NA, 2000 CAAF LEXIS 321 (Mar. 16, 2000). Accused filed a motion to stay Article 32 proceedings but was denied relief by the NMCCA under *Clinton v. Goldsmith*. CAAF disagreed and granted the motion to stay under the All Writs Act. In a concurring opinion, Judge Sullivan stated, "this Court clearly has the power to supervise criminal proceedings under Article 32, UCMJ." *See also King v. Ramos*, No. NMCM 200001991 (Jan. 26, 2001).

7. *United States v. Byrd*, 53 M.J. 35 (2000). The accused petitioned the court, asking review of an ineffectiveness of counsel claim. The accused filed the petition after the 60-day window to petition CAAF for review expired and the government had already executed his sentence under Article 71, which included a punitive discharge. The late filing of the petition was not raised and review was granted (government did not offer lack of jurisdiction or untimely filing as reasons to deny review). Two years later, and after the case had been remanded to the NMCCA for further consideration, the government requested that appellate review be terminated for lack of *in personam* jurisdiction. The NMCCA held that jurisdiction for continued review ended following the proper execution of the discharge in 1997. CAAF held that the NMCCA erred in concluding that accused's discharge was proper under Article 71 (CAAF said there was no proof in the record that the accused had been properly notified of his right to petition CAAF, and Govt. failed to establish that accused's petition was untimely, therefore, review was not yet final so the discharge should not have been executed). It stated "this Court has jurisdiction to review such a case under the All Writs Act," but declined to decide which standard of review was more appropriate, direct or collateral.

8. *Ponder v. Stone*, 54 M.J. 613 (N-M. Ct. Crim. App. 2000). Accused refused order to receive anthrax vaccination and submitted a request for a stay of proceedings by way of a writ of mandamus. Government argued that the Navy court lacked jurisdiction to entertain the petition under *Goldsmith*, because the court could only grant extraordinary relief on matters affecting the findings and sentence of a court-martial. NMCCA disagreed, stating that review of the petition under the All Writs Act was properly a matter in aid of its jurisdiction.

9. *Fisher v. Commander, Army Regional Confinement Facility*, 56 M.J. 691 (N-M. Ct. Crim. App. 2001). Accused filed petition for extraordinary relief. The government argued that the appellate court had no jurisdiction to consider the petition because the accused's court-martial was final under Article 76. The NMCCA disagreed and considered the petition (the petition was then denied).

10. *United States v. Beck*, 56 M.J. 426 (2002). The accused filed a writ-appeal petition for review of the ACCA's decision of his request for extraordinary relief and a motion to stay court-martial proceedings. The accused argued that he was fraudulently induced into signing his service contract and as such his order to active duty was void. He requested that the court-martial charges be dismissed for lack of jurisdiction and the court direct his discharge from the Army. He had filed suit in U.S. District Court to litigate the issue and argued that a stay of his court-martial proceedings should be granted until resolution of the civil case. The CAAF denied the petition and motion for stay and held that it would be inappropriate to issue a stay absent a persuasive ruling from a court outside the military justice system.

11. *Taylor v. Garaffa*, 57 M.J. 645, (N-M. Ct. Crim. App. 2002). The accused was charged with offenses that were committed prior to 15 May 2002 (effective date of the 2002 Amendments to the MCM). He filed a petition for extraordinary relief with the service court arguing that the military judge improperly denied his motion to limit the jurisdiction of his special court-martial to six months confinement and six months forfeitures. The court held that it had jurisdiction to consider the merits of the petition under the All Writs Act. As the highest judicial tribunal in the Navy, this authority was "in aid of its mandate to supervise the administration of courts-martial within the Navy and the Marine Corps."

F. Filing a Writ.

1. Does the case qualify?

a. Jurisdiction.

b. Extraordinary circumstance.

(1) Circumstances warrant extraordinary relief

(2) Ordinary course of appellate review cannot give adequate relief

(3) Available remedies are exhausted

c. Relief sought. Relief will advance judicial economy.

(1) Maximize judicial economy

(2) Resolve recurrent issues that will lead to more cases

(3) Prevent waste of time and energy of military courts.

2. Must the military judge grant a continuance?

a. Within the discretion of the military judge (R.C.M. 906(b)(1)).

b. No automatic stay; but once a stay is issued by CCA or CAAF, proceedings must stop.

3. Which forum?

a. There is a preference for initial consideration by a CCA. *See ABC, Inc. v. Powell*, 47 M.J. 363 (1997); *United States v. Redding*, 11 M.J. 100 (C.M.A. 1981) (opinion of Cook, J.); *See also* R.C.M. 1204(a), Discussion (C.M.R. filing favored for judicial economy).

b. CAAF, Rules of Practice and procedure, Rule 4(b)(1): The Court may, in its discretion, entertain original petitions for extraordinary relief . . .. Absent good cause, no such petition shall be filed unless relief has first been sought in the appropriate Court of Criminal Appeals. Original writs are rarely granted.

c. Considerations of time and subject matter.

4. Procedure.

a. Petitioner has initial burden of persuasion to show jurisdiction and extraordinary circumstances. The party seeking relief has an "extremely heavy burden." *McKinney v. Jarvis*, 46 M.J. 870, 873 (Army Ct. Crim. App. 1997; *United States v. Mahoney*, 36 M.J. 679, 685 (A.F.C.M.R. 1992). The petitioner must show that the complained of actions were more than "gross error" and constitute a "judicial usurpation of power." *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996).

b. The "show cause" order shifts the burden.

VIII. CONCLUSION.

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